Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc. *and* Congreso De Uniones Industriales De Puerto Rico. Cases 24–CA–9138, 24–CA–9144-2, 24–CA–9161, 24–CA–9216, 24–CA–9227, 24–CA–9350, 24–CA–9390, and 24–CA–9447

December 31, 2007

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On October 26, 2004, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] In its Decision and Order, the Board affirmed the administrative law judge's finding that the Respondent's decision to lay off 15 employees on February 27, 2002, was a mandatory subject of bargaining and that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing the February 27 layoffs without giving the Union adequate notice and a reasonable opportunity to bargain. Thereafter, the Board filed a petition for enforcement with the United States Court of Appeals for the First Circuit, and the Respondent filed a cross-petition for review. On December 22, 2005, the court issued its decision enforcing the Board's order in part, vacating it in part, and remanding the case to the Board for further proceedings consistent with the court's decision.[2]

On October 18, 2006, the Board notified the parties to this proceeding that it had decided to accept the remand from the First Circuit, and that all parties were permitted to file statements of position with respect to the issues raised by the remand. Thereafter, both the General Counsel and the Respondent filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the parties' statements of position and of the court's remand, which we accept as the law of the case. For the reasons that follow, we reaffirm the Board's prior finding that the Respondent violated Section 8(a)(5) and (1) by implementing its February 27, 2002 layoffs without providing the Union with adequate notice and a reasonable opportunity to bargain.[3] In so finding, we reject the Respondent's argument that it did not have a duty to bargain over the layoffs because the layoffs resulted, in part, from the Respondent's ongoing modernization efforts. As explained below, we find that, because the Respondent's layoffs were admittedly based, in part, on "economic reasons," including a reduction in sales resulting from decreased demand for its products and a loss of production resulting from an unfair labor practice strike, and because the Respondent failed to establish that it would have implemented any particular layoffs solely as a result of modernization and even in the absence of its economic reasons, the Respondent had a duty to bargain over the February 27 layoff decision.

I.

The Respondent manufactures animal feed at its Amelia and Corujo facilities and processes rice at its Arroz Rico facility. The Union has been the collective-bargaining representative of the Respondent's production and maintenance employees at the Amelia and Corujo facilities since 1986.

Beginning in 1996, the Respondent began a modernization project at its Amelia facility. As a result of this project, the Respondent laid off one or two employees each year between 1996 and 2002.

On January 8, 2002, unit employees at the Amelia and Corujo facilities initiated a strike. On February 27, in the midst of the strike, the Respondent notified 15 of the striking employees that they were being laid off. The Respondent undertook this action without providing the

[1] *Pan American Grain Co.*, 343 NLRB 318 (2004).

[2] *NLRB v. Pan American Grain Co., Inc.*, 432 F.3d 69 (1st Cir. 2005). Subsequently, the court issued a Supplemental Opinion, addressing the parties' dispute regarding the proper "scope and phrasing" of the court's judgment enforcing those portions of the Board's original order that were not vacated on review. *NLRB v. Pan American Grain Co., Inc.*, 448 F.3d 465 (1st Cir. 2006). In the Supplemental Opinion, the court denied without prejudice the Board's motion to vacate the court's December 2005 judgment and to substitute a proffered version granting *Laidlaw* relief to the 15 employees laid off in February 2002. Although denying the Board's motion, the court indicated that the Board "should be free in the remanded proceeding expressly to order *Laidlaw* relief for the 15 employees if it views that as appropriate and consistent with its prior intentions." Id. at 468. The court also appreciated, however, that the issue of *Laidlaw* relief might be "mooted by the Board's 'duty to bargain' determinations on remand." Id. For the reasons explained below in footnote 11, the instant Supplemental Decision does moot the issue of *Laidlaw* relief for the 15 laid-off employees.

[3] Having reaffirmed our prior finding in this regard, we will issue an order corresponding to those provisions of our original order that the First Circuit vacated (with certain exceptions explained below in footnote 11). Inasmuch as the court enforced the remaining provisions of our original order, we shall not repeat those here. See, e.g., *West Penn Power Co.*, 346 NLRB No. 42, slip op. at 5 fn. 10 (2006); *Bryan Adair Construction Co.*, 341 NLRB 247, 247 fn. 4 (2004).

We note that an inadvertent error in our original decision directed that paragraph 1 of our modified Order be substituted for paragraph 1(e) of the administrative law judge's recommended Order. It in fact replaces paragraph 2(e).

Union with adequate notice and a reasonable opportunity to bargain over the layoff decision.[4]

The record establishes that the Respondent's decision to lay off 15 employees on February 27 was based on the Respondent's reduced need for staffing at that time.[5] The Respondent, in its letter notifying the Union of its decision to lay off employees, indicated that the layoffs were "due to economic reasons and as a result of a substantial decrease in production and sales."[6] The Respondent offered conflicting testimony concerning the accuracy of this letter. Initially, the Respondent's president, Jose Gonzalez, testified that, in its letter, the Respondent presented the Union with a "detailed explanation" of why the Respondent was laying off the employees. Later, Gonzalez testified that the letter did not set forth "the complete reason" for the layoffs, and cited the Respondent's automation project as an additional basis for the layoffs. Gonzalez admitted, however, that sales were substantially lower in January and February 2002[7] than the levels that were originally budgeted for by the Respondent, and that the Respondent's reduced level of sales caused the Respondent to require "a lower work force."

II.

In the court of appeals, the Respondent argued that it had no duty to bargain over its layoff decision, only over the effects of that decision. The Board took the position that the Respondent was precluded from so arguing because it had not presented that argument to the Board in excepting to the administrative law judge's decision. The court rejected the Board's argument in this regard and concluded that the Board had failed sufficiently to explain why the Respondent's duty to bargain went beyond the effects of the layoff decision to the decision itself. Observing that the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), placed "automation" in a category of management decisions "to be considered on their particular facts" with respect to the duty to bargain, id. at 686 fn. 22, the court continued:

> We do not know whether the NLRB now views layoff decisions prompted by modernization to be mandatory subjects of bargaining, resolving the issue seemingly left open in *First Nat'l*, and, if so, why, or whether it decided this case on its "particular facts," and, if so, what those facts were. Possibly, the Board attributed importance to the fact that the layoffs owed something to the loss of business due to the strike but, if so, this too is unexplained, nor do we know how multiple motives for layoffs should be analyzed.

Pan American Grain, 432 F.3d at 74. We now furnish the explanation the court asked us to provide on remand.

III.

Under Section 8(a)(5) of the Act, an employer commits an unfair labor practice by "refus[ing] to bargain collectively with the representatives of his employees." Section 8(d) of the Act explains that, as part of its duty to "bargain collectively," an employer must "confer in good faith with respect to wages, hours, and other terms and conditions of employment." The Supreme Court, in turn, has long held that an employer breaches its duty to bargain in violation of Section 8(a)(5) by changing an existing term or condition of employment unilaterally, i.e., without first providing the union with adequate notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

In *First National Maintenance Corp.*, supra, the Supreme Court examined whether certain managerial decisions affecting terms and conditions of employment might fall outside the realm of mandatory subjects of bargaining under Section 8(d). The Supreme Court identified three types of management decisions: (1) those that have "only an indirect and attenuated impact on the employment relationship," such as decisions involving advertising and financing; (2) those that "are almost exclusively an aspect of the relationship between employer and employee," such as decisions related to production quotas and work rules; and (3) those that have "a direct impact on employment . . . but [have] as [their] focus only the economic profitability of" the business. *First National Maintenance*, 452 U.S. at 676–677 (internal quotations and citations omitted). In analyzing those decisions falling within the third category, the Court concluded that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-

[4] In our prior decision in this case, we considered and rejected the Respondent's exception arguing that it had, in fact, provided the Union with adequate notice of its layoff decision. 343 NLRB at 318. This portion of our original Decision and Order was not affected by the First Circuit's remand.

[5] In his complaint, the General Counsel alleged that the February layoffs resulted from antiunion animus and, thus, violated Sec. 8(a)(3) and (1) of the Act. The judge dismissed this allegation, and the General Counsel did not except.

[6] This English translation of the relevant portion of the Respondent's letter, which was written in Spanish, was quoted by the judge in his decision. No exception was filed to the judge's reliance on this translation.

[7] As the judge noted, the Respondent's significant drop in sales in January 2002 coincided with the beginning of the employees' unfair labor practice strike.

bargaining process, outweighs the burden placed on the conduct of the business." Id. at 679.

The Respondent asserts that, under the framework set forth in *First National Maintenance*, it did not have a duty to bargain with the Union over its February 27 layoff decision. The Respondent's argument is based on three contentions: (1) the layoff decision was attributable to its modernization program, (2) the Respondent's modernization program falls within the third category of *First National Maintenance* managerial decisions, and (3) the benefits to the collective-bargaining process and to labor-management relations of requiring bargaining over the layoffs resulting from the modernization program would not outweigh the burden that bargaining would place on the Respondent's ability to implement its modernization program.

In deciding the instant case, we find it unnecessary to reach the issue presented by the latter two contentions proffered by the Respondent—namely, whether the Respondent had a duty to bargain over a layoff decision based entirely on the Respondent's modernization program. We need not reach this issue because, contrary to the Respondent's first contention, we find that the Respondent's February 27 layoff decision was based on a *combination* of factors, including a substantial reduction in sales in January and February 2002 coinciding with the start of the employees' unfair labor practice strike.[8]

In its letter notifying the Union of its layoff decision, the Respondent cited "economic reasons" and "a substantial decrease in production and sales." Moreover, Gonzalez' testimony that the letter did not set forth "the complete reason" for the layoffs, and that the automation project was an additional reason, establishes that the "economic reasons" cited in the letter were separate and distinct from the ongoing automation effort. Where an employer decides to lay off employees for "economic reasons," rather than due to a change in the scope of its operations, such a layoff decision is a mandatory subject of bargaining. See, e.g., *Adair Standish Corp.*, 290 NLRB 317, 319 (1988) (finding unlawful failure to bargain over economically motivated layoffs), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990); see also *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 213–214 (1964) (stating that measures aimed at reducing labor costs are "matters peculiarly suitable for resolution within the collective bargaining framework").

In this case, to the extent that the Respondent's February 27 decision to lay off employees was motivated by a desire to reduce labor costs in response to a substantial decrease in production and sales, it is clear that the Respondent had a duty to bargain with the Union over the layoff decision. Crucially, the Respondent failed to establish that its decision to lay off any specific individual on February 27 was based exclusively on its modernization program. Had the Respondent shown that certain layoffs were attributable to modernization and others to economic concerns, then we would be in a position to address the question, raised by the court of appeals, of whether the Respondent had a duty to bargain over the particular layoffs arising solely from its modernization program. The Respondent, however, failed to produce such evidence.[9] As a result, we must assume that all of the February 27 layoffs were motivated, at least in part, by reasons other than efficiency gains resulting from modernization, i.e., a desire to reduce labor costs prompted by a substantial decrease in production and sales.[10] Accordingly, we find that the Respondent had a

[8] We wish to underline that our finding in this regard is not inconsistent with the following passage in the administrative law judge's decision, quoted by the court of appeals (432 F.3d at 73):

> The evidence substantiating the Respondent's position that an ongoing modernization and automation project had reduced staffing needs was detailed, plausible, and uncontroverted; it outweighs the evidence casting doubt on the veracity of the Respondent's explanation. The Respondent has shown that it more likely than not would have decided to implement its February 2002 layoff because its staffing needs had decreased, even absent the employees' protected activities.

343 NLRB at 337. In the discussion leading up to this conclusion, the judge found that both Gonzalez and Luis Juarbe, the Respondent's human resources director, attributed the Respondent's reduced staffing needs at least in part to decreased demand. Although the judge, in the quoted passage, emphasized the Respondent's "ongoing modernization and automation project" as a cause of its "reduced staffing needs," he did not find that the layoff decision was attributable to reduced staffing needs *resulting solely from modernization*. Indeed, he had no reason to reach that issue. The quoted passage came at the conclusion of the judge's analysis of whether the Respondent had met its rebuttal burden as to the allegation that the layoffs violated Sec. 8(a)(3). Thus, the judge was addressing the question whether the Respondent would have made those layoffs because of reduced staffing needs even in the absence of employees' Sec. 7 activities. In deciding that issue, the judge had no need to and did not decide the very different issue of whether the Respondent would have made the layoffs because of reduced staffing needs due to modernization, even in the absence of reduced staffing needs due to decreased demand.

[9] The General Counsel bears the burden, of course, to prove a violation of Sec. 8(a)(5). The General Counsel meets that burden, as he did in this case, "when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union." *Fresno Bee*, 339 NLRB 1214, 1214 (2003). At that point, the burden shifts to the employer "to show that the unilateral change was in some way privileged." Id. Thus, it was incumbent on the Respondent to show that its layoff decision, which unquestionably affected the terms and conditions of unit employees' employment in a material and substantial way, was exempt from obligatory bargaining under *First National Maintenance*.

[10] Member Schaumber notes that the Respondent is not precluded from introducing any previously unavailable evidence at the compliance stage of this proceeding to demonstrate that the reinstatement remedy for the 15 laid-off workers is unduly burdensome because their

duty to bargain with the Union over these layoffs, and that its unilateral implementation of the layoffs violated Section 8(a)(5) and (1) of the Act.[11]

ORDER

The National Labor Relations Board orders that the Respondent, Pan American Grain Co., Inc. and Pan American Grain Manufacturing Co., Inc., Guaynabo, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off unit employees without first giving adequate notice of its intention to do so to the Union and affording the Union an opportunity to bargain in good faith over the layoff decision and its effects.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the decision to lay off employees on February 27, 2002, and the effects of that decision.

(b) Within 14 days from the date of this Order, offer each of the employees laid off on February 27, 2002, full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed.

(c) Make each of the employees laid off on February 27, 2002, whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Guaynabo, Puerto Rico, and Bayamon, Puerto Rico, in English and Spanish, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 27, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 2007

Wilma B. Liebman, Member

jobs no longer exist. See *Compu-Net Communications*, 315 NLRB 216, fn. 3 (1994), citing *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989).

[11] As we noted above, supra fn. 2, the General Counsel moved the court of appeals to award the 15 employees laid off in February 2002 a remedy under *Laidlaw*, 171 NLRB 1366 (1968). The court denied that motion without prejudice, stating that the Board was free to order that relief in the remanded proceeding. The General Counsel renews his *Laidlaw* argument in his statement of position. We find it unnecessary to pass on that issue. As a remedy for the Respondent's 8(a)(5) unilateral layoff violation, the employees laid off on February 27 are entitled to full backpay and offers of reinstatement. Thus, any relief awarded under a *Laidlaw* theory would be redundant. Accordingly, we also find it unnecessary to reissue paragraphs 1(e), 2(e), and 2(f) of our original Order, the cease-and-desist and affirmative-action provisions that implemented a *Laidlaw* remedy for the former strikers, including those strikers laid off on February 27. The court of appeals enforced those paragraphs *except* as they applied to the laid-off strikers, and, for the reasons just stated, the laid-off strikers are made whole by our instant Order even without a *Laidlaw* remedy.

Member Schaumber would reach the *Laidlaw* issue and find that the 15 employees laid off on February 27 are not entitled to a *Laidlaw* remedy. Under *Laidlaw*, supra, economic strikers who unconditionally apply for reinstatement after their positions were filled by permanent replacements are entitled to full reinstatement upon the departure of the replacement workers. 171 NLRB at 1369–1370. Here, however, the Respondent laid off the 15 workers for economic reasons, due to decreased staffing needs, their positions have never been filled and there is no evidence the 15 laid-off workers' jobs still exist.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off unit employees without first giving adequate notice of our intention to do so to the Union and affording the Union an opportunity to bargain in good faith over the layoff and its effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request, bargain with the Union concerning the decision to lay off employees on February 27, 2002, and the effects of that decision.

WE WILL, within 14 days from the date of the Board's Order, offer each of the employees laid off on February 27, 2002, full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed.

WE WILL make each of the employees laid off on February 27, 2002, whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, less any net interim earnings, plus interest.

PAN AMERICAN GRAIN CO., INC. AND PAN AMERICAN GRAIN MANUFACTURING CO. INC.